Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CRISTAL DUNKERSON, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C03-3002-MWB **MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

TABLE OF CONTENTS

I. INTRODUCTION

The plaintiff Cristal Dunkerson ("Dunkerson") seeks judicial review of the final decision of the Commissioner of Social Security denying her applications for Title XVI supplemental security income ("SSI") and Title II disability insurance ("DI") benefits. This matter was referred to United States Magistrate Judge Paul A. Zoss. Judge Zoss recommended judgment enter in favor of the Commissioner and against Dunkerson. Dunkerson filed objections to the Report and Recommendation. The Commissioner filed no response to Dunkerson's objections.

II. BACKGROUND

Dunkerson filed her applications on October 16, 2000. She alleges disability "due to mental problems, bilateral carpal tunnel syndrome, back and hip problems, and migraine headaches." (R. at 14). The record indicates Dunkerson was diagnosed with chronic low back pain, neck pain, and muscle spasms in June 1999. (R. at 232-233). She is 5'5" tall and weighs around 208 pounds. Dunkerson's applications were denied on April 10, 2001 (R. at 109-1111, 399-401), and denied again upon reconsideration, on August 21, 2001. (R. at 96, 103-107). On October 22, 2001, Dunkerson filed a timely request for hearing before an ALJ. (R. at 108). A hearing was held on February 6, 2002. (R. at 33-94). On August 20, 2002, Dunkerson's claim was denied by the ALJ. (R. at 10-27). Dunkerson filed a request for review by the Appeals Council. On November 8, 2002, the Appeals Council denied Dunkerson's request for review (R. at 5-7), making the ALJ's decision the final decision of the Commissioner. Dunkerson filed a timely request for review in this court.

In his Report and Recommendation, Judge Zoss concluded that the ALJ's credibility determination of Dunkerson's subjective complaints was supported by substantial evidence

in the record and that the ALJ included all of Dunkerson's limitations documented by the medical evidence and testimony when determining her residual functional capacity ("RFC"). Further, Judge Zoss found that the ALJ included in the hypothetical question all of the limitations the ALJ believed to be credible. Judge Zoss, therefore, recommended that judgment enter in favor of the Commissioner and against Dunkerson. On January 30, 2004, Dunkerson filed her objections with the court. The court waited to see if the Commissioner would file a reply to Dunkerson's objections. The court has received no reply and finds the matter is now fully submitted for consideration.

III. LEGAL ANALYSIS

A. Standards Of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case, the court must conduct a *de novo* review "of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The court has done so by reviewing the record before Judge Zoss in light of Dunkerson's objections to Judge Zoss's Report and

Recommendation.

Because *de novo* review is required of some portions of the record, the court turns next to the standard of review courts must apply to administrative decisions in Social Security disability cases. This court summarized those standards in *Wiekamp v. Apfel*, 116 F. Supp. 2d 1056 (N.D. Iowa 2000), as follows:

> The role of the courts in such a review "is to determine whether the Commissioner's findings are supported by substantial evidence on the record as a whole." *Singh v. Apfel*, 222 F.3d 448, 451 (8th Cir. 2000); *accord Wheeler v. Apfel*, 224 F.3d 891, 893-94 (8th Cir. 2000); *Burnside v. Apfel*, 223 F.3d 840, 843-44 (8th Cir. 2000); *Cunningham v. Apfel*, 222 F.3d 496, 500 (8th Cir. 2000). As the Eighth Circuit Court of Appeals recently explained, "Substantial evidence is less than a preponderance, but is enough so that a reasonable mind would find it adequate to support the ALJ's conclusion. *See Cox v. Apfel*, 160 F.3d 1203, 1206-07 (8th Cir. 1998). In determining whether existing evidence is substantial, we consider 'evidence that detracts from the Commissioner's decision as well as evidence that supports it.' *Warburton v. Apfel*, 188 F.3d 1047, 1050 (8th Cir. 1999)." *Singh*, 222 F.3d at 451; *Wheeler*, 224 F.3d at 893-94; *Burnside*, 223 F.3d at 843-44; *Cunningham*, 222 F.3d at 500. Thus, under this standard of review, the court "may not reverse the Commissioner's decision merely because substantial evidence exists in the record that would have supported a contrary outcome," *Wheeler*, 224 F.3d at 894, "or because [the court] would have decided the case differently." *Burnside*, 223 F.3d at 843. Rather, "[t]he court is required to review the administrative record as a whole, considering evidence which detracts from the Commissioner's decision, as well as that which supports it." *Wheeler*, 224 F.3d at 894; *Burnside*, 223 F.3d at 843.

Wiekamp, 116 F. Supp. 2d at 1060-61. Subsequent decisions of the Eighth Circuit Court of Appeals apply identical standards. *See Lauer v. Apfel*, 245 F.3d 700 (8th Cir. 2001); *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001); *Dunahoo v. Apfel*, 241 F.3d 1033,

1037 (8th Cir. 2001); *Johnson v. Apfel*, 240 F.3d 1145, 1147 (8th Cir. 2001). Therefore, this court will apply these standards in its *de novo* review of the issues identified in Dunkerson's objections, taking each of those objections in turn.

B. Dunkerson's Objections

Dunkerson has three objections to the Report and Recommendation. Dunkerson contends, first, that Judge Zoss incorrectly found substantial evidence supports the ALJ's finding that Dunkerson's testimony was not credible. Second, Dunkerson contends that Judge Zoss incorrectly found that the ALJ's RFC included limitations documented by the medical evidence. Third, Dunkerson argues that the ALJ's hypothetical question did not accurately reflect her level of functioning and that the jobs identified by the vocational expert are not within her abilities.

C. Discussion

As stated above, a district court's standard of review is narrow and the court will affirm an ALJ's findings if the findings are supported by substantial evidence on the record as a whole. *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). After a district court reviews the record, if the court finds that it is "possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, the court must affirm the Commissioner's decision." *See Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000).

1. ALJ's Credibility Determination

The Eighth Circuit Court of Appeals has cautioned that "[t]he ALJ is in the best position to determine the credibility of the testimony and is granted deference in that regard." *Johnson*, 240 F.3d at 1147 (citing *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984)). Therefore, courts "'will not disturb the decision of an [ALJ] who seriously

considers, but for good reasons explicitly discredits, a claimant's testimony of disabling pain.'" *Id.* at 1148 (quoting *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir. 1996), in turn quoting *Browning v. Sullivan*, 958 F.2d 817, 821 (8th Cir. 1992)).

As the Eighth Circuit Court of Appeals has explained,

> In analyzing a claimant's subjective complaints, such as pain, an ALJ must consider: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the condition; (3) dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions. *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (factors from *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). "Other relevant factors include the claimant's relevant work history and the absence of objective medical evidence to support the complaints." *Id.* As we have often stated, "there is no doubt that the claimant is experiencing pain; the real issue is how severe that pain is." *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993) (quoting *Thomas v. Sullivan*, 928 F.2d 255, 259 (8th Cir. 1991)). We will not disturb the decision of an ALJ who considers, but for good cause expressly discredits, a claimant's complaints of disabling pain, even in cases involving somatoform disorder. *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993); *Metz v. Shalala*, 49 F.3d 374, 377 (8th Cir. 1995).

Gowell, 242 F.3d 793, 796 (8th Cir. 2001); *see also Dunahoo*, 241 F.3d at 1038 (also identifying the "*Polaski* factors" for analyzing subjective pain complaints); *Hogan v. Apfel*, 239 F.3d 958, 961-62 (8th Cir. 2001) (also identifying the "*Polaski* factors").

An ALJ meets his or her burden to demonstrate grounds for disregarding subjective complaints where the ALJ articulates the inconsistencies in the record as a whole. *Johnson*, 240 F.3d at 1149; *see also Dunahoo*, 241 F.3d at 1038 (finding, "[t]he ALJ may discount complaints of pain if they are inconsistent with the evidence as a whole"). Moreover, "[i]f the ALJ discredits a claimant's credibility and gives a good reason for doing so, we will defer to its judgment *even if every [Polaski] factor is not discussed in depth*." *Dunahoo*,

241 F.3d at 1038 (emphasis added) (finding further that the ALJ's decision was adequate where "[t]he ALJ recited the five *Polaski* factors and detailed the relevant evidence"). "Any arguable deficiency . . . in the ALJ's opinion-writing technique does not require the Court to set aside a finding that is supported by substantial evidence." *Johnson*, 240 F.3d at 1149. With the Eighth Circuit's rulings as a guide, the court now considers Dunkerson's objections regarding Judge Zoss's finding that, "the ALJ's credibility findings are supported by substantial evidence on the record as a whole." Report and Recommendation, Doc. No. 16 at 45.

a. ALJ's consideration of Dunkerson's medication. Dunkerson argues that the number of different medications that she takes and the dosage amounts of these medications favor a finding of disability. Further, Dunkerson asserts that the ALJ failed to address her use of different medications and the dosage amounts when he determined her credibility and that this failure is error. A review of the ALJ's decision reveals that the ALJ did consider and address Dunkerson's medications. The ALJ's decision provides a summary of medications prescribed. In June 1999, Dr. Motoc prescribed Celebrex[1] for pain, Flexeril[2] as a muscle relaxer, and a wrist brace for suspected carpal tunnel syndrome. (R. at 14). In August 1999, the ALJ noted that Dr. Motoc prescribed Fiorinal[3] to treat migraine headaches. (R. at 14). The ALJ notes that Dunkerson did not seek further medical treatment for nine months. (R. at 15). When Dunkerson saw Dr. Motoc, on May 18,

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[1] Celebrex (celecoxib): used to relieve some symptoms caused by arthritis, such as inflammation, swelling, stiffness and joint pain. Also used for moderate to severe pain, such as after dental or orthopedic procedures. *USPDI* 382-382 (2003 23rd Ed).

[2] Flexeril (cyclobenzaprine):used to help relax certain muscles. Helps relieve the pain, stiffness, and discomfort caused by strains, sprains, or injuries to muscles. *USPDI* 540-542 (2003 23rd Ed).

[3] Fiorinal: a combination pain reliever and relaxant using Butalbital and aspirin. It is used to treat tension headaches. *USPDI* 382-384 (2003 23rd Ed).

2000, he prescribed Zoloft[4] and Sonata[5] to treat Dunkerson's complaints of depression and anxiety relating to her mother's death. (R. at 15). However, the ALJ's decision notes that on May 25, 2000, Dr. Motoc discontinued the Zoloft and prescribed Effexor[6] instead. (R. at 15). On June 20, 2000, Dunkerson's medications included Effexor for her mental symptoms and Ultram[7] for pain. (R. at 15). On July 18, 2000, Dunkerson reported that she was feeling better after receiving the medication Effexor. (R. at 15). In October and November 2000, Dunkerson reported no side effects regarding her medications. (R. at 16). On December 27, 2000, Dunkerson reported she was sleeping better and that she felt stable and did not need an increase in medications. (R. at 16). The ALJ noted that in January and March 2001, Dunkerson indicated she was having no side effects and that she was sleeping well and working and going to try to increase her hours at work. (R. at 16). In August 2001, Dunkerson was prescribed the medication Topamax[8] and she reported that her mood improved "just a little." (R. at 16). On September 18, 2001, Dunkerson reported, "no depression." (R. at 16).

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[4] Zoloft (sertraline): used to treat mental depression, obsessive-compulsive disorder, panic disorder and posttraumatic stress disorder. It belongs to the SSRI class (selective serotonin reuptake inhibitor) and is thought to work by increasing the activity of the chemical serotonin in the brain. *USPDI* 1405-1407 (2003 23rd Ed).

[5] Sonata(zaleplon): belongs to the group called CNS (central nervous system) depressant. It is used to treat insomnia. *USPDI* 1592-1593 (2003 23rd Ed).

[6] Effexor XR (venlafaxine): used to treat mental depression. It is also used to treat certain anxiety disorders or to relieve the symptoms of anxiety. *USPDI* 1557-1559 (2003 23rd Ed).

[7] Ultram (tramadol): used to relieve pain, including pain after surgery. The effects of tramadol are similar to those of narcotic analgesics. *USPDI* 1515-1517 (2003 23rd Ed).

[8] Topamax(topiramate): used to control some types of seizures in the treatment of epilepsy. This medicine cannot cure epilepsy and will only work to control seizures for as long as you continue to take it. *USPDI* 1509-1510 (2003 23rd Ed).

As part of the ALJ's determination of a claimant's credibility *Polaski* requires consideration of the "dosage, effectiveness, and side effects of medications." *Polaski*, 739 F.2d at 1322. It is apparent to this court that the ALJ adequately took into consideration Dunkerson's medications. Although it would have been more informative to this court to have the ALJ explicitly state each individual medication prescribed, the exact dosage of each medication prescribed, and each time a medication was prescribed and it's use ended—the ALJ did consider Dunkerson's medication regiment and noted that it is "generally effective without any adverse side effects." (R. at 22). The ALJ also stated that medical treatment notes indicate Dunkerson's pain medications have kept her pain under control. (R. at 22). Dunkerson asserts that the ALJ erred because he did not consider the dosage of her medication and argues that the ALJ failed to reference the fact that Dunkerson is prescribed "Effexor XR 225 mg./day; in addition, she takes Remeron[9] 15 mg./day; and Trazodone[10]." However, the record reveals that Dunkerson testified before the ALJ that she no longer takes Remeron. (R. at 76). In addition, during her hearing before the ALJ, Dunkerson testified that the only side effect of her medications was that she experienced a dry mouth. (R. at 76).

As stated by the Eighth Circuit Court of Appeals, "Impairments that are controllable or amenable to treatment do not support a finding of disability." *Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir.1998); *see also Roth v. Shalala*, 45 F.3d 279, 282 (8th Cir. 1995) (an impairment is not disabling if it can be controlled by treatment or medication). It is apparent from the record that Dunkerson does suffer from depression/anxiety. However, Dunkerson receives treatment for her depression in the form of counseling and prescribed medications. There is substantial evidence in the record that reveals Dunkerson's

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[9] Remeron(mirtazapine): used to treat mental depression. *USPDI* 1095-1097 (2003 23rd Ed).

[10] Desyrel(trazodone) used as an antidepressant or "mood elevator." *USPDI* 1523-1524 (2003 23rd Ed).

depression/axiety is controlled. On March 14, 2001, psychiatrist consultant, T.R. Liautaud, D.O.[11] evaluated Dunkerson and she reported to Dr. Liautaud that she was feeling better. (R. 269). It is also apparent from the medical treatment notes that Dunkerson has not always been compliant with her medication regiment. For example, on September 18, 2001, Dunkerson reported to her counselor that she stopped taking medication on her own, that things were better, and that she was less depressed. (R. at 336). Although an ALJ is required to develop the record fully and fairly, an ALJ is not required to discuss every piece of evidence submitted, and this would include each and every medication prescribed, dosage and modification to a claimant's medication regiment. *Morrison v. Apfel*, 146 F.3d 625, 628 (8th Cir. 1998); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir.1998) (citing *Miller v. Shalala*, 8 F.3d 611, 613 (8th Cir. 1993) (*per curiam*)). The ALJ must consider all of the evidence but the fact that the ALJ did not explicitly discuss each of Dunkerson's prescribed medications is not necessarily fatal to his opinion. *Brown v. Chater*, 87 F.3d 963, 966 (8th Cir. 1996). The record reveals that Dunkerson reported no significant adverse effects from her medication regiment. Further, as noted above, the record contains medical notations that Dunkerson reported, "no depression" and that things were getting "better." The use of medication, and/or the dosage amount alone, does not support a finding of disability. Even when a claimant takes a significant amount of medication, if the medication is working and the limitation is controlled by the medication and/or counseling there will be no finding of disability. Although Dunkerson's condition may require counseling and medication, this does not mean that she is unable to

[11] D.O. is the abbreviation for a doctor of osteopathic medicine, also referred to as osteopathic physicians. Osteopathic physicians work in partnership with their patients. They consider the impact that lifestyle and community have on the health of each individual, and they work to erase barriers to good health. D.O.s are licensed to practice the full scope of medicine in all 50 states. They practice in all types of environments including the military, and in all types of specialties from family medicine to obstetrics, surgery, and aerospace medicine. *See* http://www.aacom.org

work. In this particular case, the other evidence contained on the record as a whole supports the ALJ's position. Although Dunkerson contends that the amount of dosage in this case supports a finding of disability and to deny benefits would be in conflict with other opinions, the court points out that each social security case contains its own unique set of facts. This case, as other cases, is not decided by dosage alone but on consideration of several other factors. As previously stated, an ALJ meets his or her burden to demonstrate grounds for disregarding subjective complaints if the ALJ articulates the inconsistencies in the record as a whole. *Johnson*, 240 F.3d at 1149. Moreover, "[i]f the ALJ discredits a claimant's credibility and gives a good reason for doing so, we will defer to its judgment even if every [*Polaski*] factor is not discussed in depth." *Dunahoo*, 241 F.3d at 1038. In the context of this case, the ALJ's failure to provide explicit dosage amounts as part of the *Polaski* analysis is harmless error. Although dosage of medication may be one piece of evidence to consider, if there is other evidence and other inconsistencies in the record to support the ALJ's findings, the failure to discuss every dosage is harmless. Therefore, Dunkerson's objection as to this issue is overruled.

b. Other credibility issues. Dunkerson contends the court should not presume Dunkerson's "testimony is not credible because the ALJ so found." Dunkerson argues that a report of improving for the purposes of a treatment program has no necessary relation to her ability to work or to her work-related functional capacity. The court finds, however, that the record reveals that it is not the reported improvements alone that support the ALJ's decision. Dunkerson was also seen by Ms. Simmons, a licensed independent social worker at the Carroll Regional Counseling Center. Although not a treating medical source, Ms. Simmons is an "other medical source" who's therapy notes are consistent with the other evidence on the record as a whole. Ms. Simmons counseled Dunkerson for depression/anxiety for several months and she discussed issues surrounding Dunkerson's workplace— encouraging Dunkerson to find and maintain work. (R. 259, 264, 265, 273). The following comments were included in Dunkerson's therapy notes:

> She gets too depressed when she can't get out. She processed feelings around money problems. We discussed options. She said her son can't get a job and since she doesn't have a phone [then] he usually has the car she can't [use] either. We discussed options. She said she'd like to drive cab. This therapist handed her the phone. She called. He came here and interviewed her. She got the job. Cristal was much more positive upon leaving.

(R. at 273). Dunkerson's therapy records support the opinions of Dunkerson's treating physicians. The treatment records of Dunkerson's treating physicians and her counselor support a finding that Dunkerson's depression/anxiety impairment is controllable or amenable to treatment. The court also notes that Dunkerson's treating physician, Dr. Motoc, when asked to respond to the Disability Determination Services' questionnaire, as to whether Dunkerson could work eight hours a day, reported that Dunkerson could work a six to eight hour day. (R. at 390, 391).

Dunkerson argues that Judge Zoss based his finding that Dunkerson was not credible on the ALJ's determination that Dunkerson's testimony was not credible. This is not the case. Judge Zoss found Dunkerson was not credible because there is substantial evidence on the record as a whole that supports the ALJ's conclusion. There are inconsistencies contained in the record between the level of depression/anxiety Dunkerson reported during the hearing before the ALJ and, as previously discussed, what the other evidence in the record revealed regarding her reported activities and depression/anxiety. Although Dunkerson testified at the hearing before the ALJ that she still experiences depression (R. at 57), there is other evidence in the record showing improvement in her depression/anxiety. (R. at 271, 272, 299, 333, 336, 339). Furthermore, in assessing Dunkerson's credibility, the ALJ noted that her testimony was not supported by the medical evidence of record or the testimony of the medical and vocational experts. An ALJ may discount subjective complaints if inconsistencies are apparent in the evidence as a whole. *See Wheeler v. Apfel*, 224 F.3d 891 (8th Cir. 2000) (citing *Hutton v. Apfel*, 175 F.3d 651,

655 (8th Cir. 1999)). Dunkerson testified at the hearing that she has no ambition and no energy (R. at 56) and yet, the record indicates she was able to work on several projects and took those projects to the fair; and that she won first and second place ribbons. (R. at 293). The record also indicates she reported keeping busy planting, baking, and crocheting; though, she testified at the hearing before the ALJ that she no longer crochets. (R. at 288, 65). Dunkerson also testified that she has attended five or six months of computer classes to learn to operate a computer. (R. at 69). The classes were three hours in duration, three times a week, and she learned Windows and MS DOS. (R. at 80). The court acknowledges that the death of Dunkerson's mother resulted in a temporary flare of symptoms of depression/anxiety. (R. at 56, 79). However, the court is in agreement with the ALJ that with time, medication and treatment the symptoms have diminished.

A review of the ALJ's opinion shows that he considered the entire record including objective medical evidence, Dunkerson's testimony, medication, treatment measures, and work history. The court concludes that the ALJ's finding that Dunkerson's testimony was not credible is supported by substantial evidence in the record as a whole. The court concurs with Judge Zoss that the ALJ undertook a proper credibility analysis, and articulated the inconsistencies on which he relied in reaching his decision. Therefore, Dunkerson's objections as to these issues are overruled.

2. Residual Functional Capacity

In assessing a claimant's residual functional capacity (RFC), it is the ALJ's responsibility to consider all the relevant evidence, including medical records, observations of treating physicians, and others, and plaintiff's own description of her limitations. *See* 20 C.F.R. § 404.1546 and § 416.946 (2000); *see also Roberts v. Apfel*, 222 F.3d 466, 469 (8th Cir.2000) (citing *Anderson v. Shalala*, 51 F.3d 777, 779 (8th Cir.1995)). In this case, the ALJ found that Dunkerson had the following RFC:

> [L]ift a maximum of 20 pounds, 10 pounds routinely; standing up to 45 to 60 minutes at a time; sit for 45 to 60 minutes at a

> time; walk 45-60 minutes at a time. The individual must avoid repetitive bending, stooping, squatting, kneeling, crawling, or climbing; and repetitive pushing or pulling more than 20 pounds. The individual's grip, gross manipulation and fine manipulation abilities are intact but the individual must avoid frequent, repetitive upper extremity movements. There should be no repetitive work with the arms overhead; no exposure to more than a moderate level of vibration. The individual is not able to do very complex technical work, but is able to do more than simple, routine, repetitive work. The work should not require constant attention to detail or constant public contact. There should be occasional supervision. The individual is able to work at a regular pace and must avoid more than a mild to moderate level of stress.
>
> Regarding the claimant's mental limitations, in the areas of activities of daily living, the claimant has a mild degree of limitation; in the area of social functioning, the claimant has a mild to moderate degree of limitation; in the area of concentration, persistence or pace, the claimant has a mild degree of limitation; and in the area of episodes of decompensation, the claimant has a rating of none. The evidence does not establish the presence of a residual disease process resulting in such marginal adjustment that even a minimal increase in mental demands or change in the environment would cause decompensation, nor is there a demonstrated inability to function outside a highly supportive living arrangement.

(R. at 26). Dunkerson contends that the ALJ's RFC finding is flawed because it fails to include limitations documented by the medical evidence. Dunkerson argues that the ALJ gave a good deal of weight to the reports of the Disability Determination Services' non-examining consultants and that more weight should have been given to Dr. Wallace's opinion. Dunkerson contends that Dr. Wallace was the only examining psychologist who provided an RFC determination as to Dunkerson's mental limitations and that more weight should have been given to his opinion. Further, Dunkerson asserts that at a minimum this

case should be remanded because the evidence available is insufficient to allow the ALJ to form an accurate opinion.

A claimant's RFC is based on all the relevant evidence of the individual's ability to do work-related activities. *Depover v. Barnhart*, 349 F.3d 563, 565 (8th Cir. 2003). When determining RFC, the ALJ is required to consider statements about what Dunkerson is able to do from her treating medical sources, from other non-treating sources, and from Dunkerson herself. It is the ALJ's responsibility to determine the "relevant evidence" provided by Dunkerson based upon his evaluation of all the evidence. In this case, the ALJ gave a detailed discussion of all of the relevant medical and non-medical evidence, discussed Dunkerson's ability to perform sustained work activities on a regular and continuing basis, and described the maximum amount of each work related activity. Dunkerson reported that she could lift twenty pounds. (R. at 253). However, the ALJ limited her to lifting ten pounds routinely based on other evidence in the record. (R. at 253). The limitation for sitting, standing and walking is based on Dr. Wilson's opinion, after he conducted a physical examination of Dunkerson, that she can sit, with normal breaks, for a total of six hours in an eight-hour work day. (R. 245). Another physician, Dr. Koons, reviewed the record and concurred with this finding. (R. at 323). As noted by Judge Zoss, the ALJ's assessment took into consideration a ten-minute break every hour, as Dunkerson urged, and the ALJ's assessment is an accurate determination of this limitation, allowing Dunkerson the ability to change position after forty-five to sixty minutes of sitting. Further, there are occupational therapy reports that discuss this limitation. One such report included the observation, "this patient demonstrates no difficulty with prolonged standing during the evaluation, nor does she demonstrate any difficulty with walking or changing from sitting to stand positions." (R. at 239). Dr. Hardinger observed that Dunkerson could make a fist, that her sensory and reflexes in the lower extremities were normal. (R. at 234-237). In Dr. Hardinger's notes, inconsistencies exist between Dunkerson's report that she can travel in a car for more than forty-five to

sixty minutes before experiencing low back pain and her statement that in an eight-hour day she had the ability to sit for only fifteen to twenty minutes. (R. at 234). The ALJ also considered the opinion of Dunkerson's family physician, Dr. Motoc. Dr. Motoc's opinion included the following limitations:

> With respect to lifting and carrying I think that Ms. Dunkerson should not be asked to lift more than 5-10 pounds on an occasional basis.
>
> With regards to her ability to stand, sit walk and move around I do believe that she should be able to perform well if she will get a 10 minute break every 45 to 60 minutes.
>
> I do have concerns with respect to her kneeling, climbing, stooping, or crawling abilities since I do believe she should not be asked to perform such activities in order to prevent aggravation to her back pain.
>
> I see no limits with respect to handling objects if she will be allowed to pause as recommended above.
>
> With respect to seeing, hearing, speaking or with issues concerning exposure to the work environment, such as dust, fumes, temperatures or hazards I do not have any particular concerns.

(R. at 210). As Dunkerson's primary treating source and "family physician," Dr. Motoc, could have easily included in his opinion that Dunkerson was not able to work. However, he did not opine that Dunkerson was either disabled or incapable of working. In fact, on February 2, 2002, Dr. Motoc filled out a questionnaire regarding his opinion as to Dunkerson's abilities. He wrote, "Mrs. Dunkerson is capable of working 6[hours] - 8[hours] a day." (R. at 390, 391). Further, Dr. Motoc wrote, "I think that she is capable of performing better now than in November 2000." (R. at 391). In addition, the ALJ wrote to Dr. Motoc to clarify the doctor's limitation of stopping work for ten minutes. (R. at 24). Dr. Motoc responded that the break was to allow Dunkerson "to rest her lumbar

and the breaks could consist of alternative activities such as standing after prolonged sitting or visa versa." (R. at 24).

In addition, Dunkerson contends that the ALJ and Judge Zoss failed to consider her intellectual functioning, depression/anxiety in combination with her physical limitations. Dunkerson argues that the ALJ's assessment is deficient because it is neither comprehensive nor individualized. Dunkerson urges the court to find that the ALJ erred in discounting Dr. Wallace's opinion. An examination was conducted by Dr. Wallace at the request of Dunkerson's legal counsel. Dr. Wallace examined Dunkerson only one time. The ALJ did discuss Dr. Wallace's examination and concluded as follows:

> Upon examination Dr. Wallace noted that he administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) to the claimant, who attained a Verbal IQ score of 85, a Performance IQ score of 89, and a full Scale IQ score of 86. Dr. Wallace noted that specific results obtained by comparing subtest scores suggested that the claimant experiences particular problems associated with comprehension of verbal material and the ability to process visual material rapidly. With respect to work-related abilities, Dr. Wallace noted his opinion that the claimant's deficit in processing speed would be expected to have an adverse impact on her ability to maintain an appropriate work pace.
>
> The undersigned gives the opinion concerning pace little weight. The one time examining psychologist is not a treating source. There is no indication that the psychologist reviewed other evidence in the record to corroborate any findings. The pace opinion is not consistent with other evidence in the record. Throughout the time in question the claimant has continued to drive. The claimant has worked as a cab driver. As mentioned above, the ability to drive requires the ability to react to changing traffic situations, traffic signs and traffic signals, at times instantaneously.

(R. at 17). The court also notes that the record contains evidence that Dunkerson was able to attend computer training and learn both Windows and Dos. Further, Dunkerson has

worked as an authorizer; a service representative/dispatcher; sales clerk; cashier; crew person; cook; reservation clerk; house keeper; and cab driver. She has worked a variety of jobs that require the ability to process verbal material and visual material. In addition, the ALJ considered the opinions of Dr. Wright. Dr. Wright noted that despite Dunkerson's limitation she was able "to sustain sufficient concentration and attention to perform a range of non-complex repetitive and routine cognitive activity when she is motivated to do so." (R. at 203). Dr. Wright also noted:

> [T]he majority of her complaints are physical in nature . . . the claimant currently appears able to sustain sufficient concentration and attention to perform a range of non-complex repetitive and routine cognitive activity when she is motivated to do so. . . . . A preponderance of the evidence in file, does not support significant restrictions of function with the claimant's social interaction.

(R. at 203). The court does not agree with Dunkerson that the ALJ erred in his assessment of her RFC. As required by the regulations, the ALJ evaluated the severity of Dunkerson's mental impairments. (R. at 17-18). The limitation of performing at a regular work pace is supported by the evidence contained in the record as a whole. This court agrees with Judge Zoss's finding that the ALJ "properly and appropriately supported his decision to discount Dr. Wallace's opinion and Dunkerson's testimony regarding her work pace limitations." Report and Recommendation, Doc. No. 16 at 47). The ALJ acknowledged that Dunkerson has depression/anxiety and physical limitations and those limitations are reflected in the RFC. Dunkerson refers this court to the Eighth Circuit Court of Appeal's *Lauer* decision holding that if an ALJ does not believe the professional opinions available are sufficient to allow the formation of an opinion, then the record should be developed further to determine if the mental impairments limit a claimant's ability to engage in work-related activities. *Lauer v. Apfel*, 245 F.3d 700, 706 (8th Cir. 2001). While it is true that Dr. Wallace is the only examining psychologist to opine as to Dunkerson's RFC, there are also treatment notes from her psychiatric consultant, Dr. Liautaud, as to Dunkerson's

depression/anxiety and in support of Dr. Liautaud's notes there are numerous notes from Dunkerson's therapy session with licensed social workers. The court finds that this case is distinguishable from *Lauer*. In Dunkerson's case there is enough evidence from professional opinions and treatment notes to establish how Dunkerson's impairments affect her RFC. Although Dunkerson claims that the ALJ should have adopted the RFC findings of psychologist Dr. Wallace, who saw Dunkerson only once, this court disagrees because the opinions of Dr. Wright, Dr. Wilson, Dr. Koons, Dr. Liautaud, and Dr. Motoc, in addition to the notes made during Dunkerson's therapy session, demonstrate that there is substantial evidence on the record as a whole to support the ALJ's conclusion. The court finds her treatment notes primarily reflect an improvement in Dunkerson's mood. Additionally, treatment notes indicate Dunkerson had situational depression because of her mother's death and other matters. Contrary to Dunkerson's argument, this case should not be remanded. Further, although there is not one medical source that provides the exact limitations found by the ALJ, it is apparent to the court that the ALJ's RFC determination is supported by substantial evidence on the record as a whole.

The ALJ did not fragmentize Dunkerson's impairments but considered them in combination. The ALJ's RFC takes into consideration those limitations that the ALJ determined to be relevant based on the evidence; including medical records, observations of treating physicians, and others, and Dunkerson's own description of her limitations. Therefore, Dunkerson's objection as to this issue is overruled.

3. Hypothetical Question

Dunkerson also argues that the ALJ erred by presenting the vocational expert with a hypothetical that did not accurately reflect her level of functioning and that the jobs identified were not within her abilities. A hypothetical question posed to a vocational expert is sufficient if it sets forth impairments supported by substantial evidence in the record and accepted as true by the ALJ. *See Prosch v. Apfel,* 201 F.3d 1010, 1015 (8th Cir. 2000). The hypothetical question must capture the concrete consequences of the

claimant's deficiencies. *Taylor v. Chater*, 118 F.3d 1274, 1278 (8th Cir.1997). Likewise the ALJ may exclude any alleged impairments that he has properly rejected as untrue or unsubstantiated. *Long v. Chater*, 108 F.3d 185, 187 (8th Cir.1997). The Eighth Circuit has consistently held that questions posed to a vocational expert should set out precisely the claimant's physical and mental impairments. *Warburton v. Apfel*, 188 F.3d 1047, 1049 (8th Cir.1999) ("Such a hypothetical 'should precisely set out the claimant's particular physical and mental impairments.'") (quoting *House v. Shalala*, 34 F.3d 691, 694 (8th Cir.1994)).

Here, the ALJ posed the following hypothetical question to the vocational expert:

> My first assumption is that we have an individual who is 46 years old. She was 44 years old as to the alleged onset date of disability. She is a female with a high school education and past relevant work as you've indicated in Exhibit 14E, and she has the following impairments. She has cervical [INAUDIBLE], with a history of cervical strain, medically determinable impairment resulting in complaints of low back, hip and leg pain. History of Carpal Tunnel Syndrome, hypertension, history of migraine headaches, obesity, history of fibromyalgia, a major depressive disorder, generalized anxiety disorder, panic disorder without agoraphobia and a history of dyslexia. As a result of a combination of those impairments she has the residual functional capacity as follows. This individual should not lift more than 20 pounds, routinely lift 10 pounds. No standing of more than 45 to 60 minutes at a time, no sitting of more than 45 to 60 minutes at a time, and no walking of more than 45 to 60 minutes at a time, with no repetitive bending, stooping, squatting, kneeling, crawling or climbing. No repetitive pushing or pulling of more than 20 pounds. Her grip, gross, and fine manipulation are intact, but she should avoid frequent repetitive upper extremity movements. She should not repetitively work with her arms overhead. She should not be exposed to more than moderate levels of vibration. She is not able to do very complex or technical work, but is able to do more than simple, routine, repetitive work, which does not require constant attention to detail or constant contact with the public. She does require occasional supervision. She should not work at more than a regular pace

> and by choosing three speeds of pace, being fast, regular and slow. She should not work at more than a mild to moderate level of stress. Would this individual be able to perform any jobs she previously worked at either as she performed it or as it is generally performed within the national economy?

(R. at 87). The vocational expert answered, "Not in my opinion." (R. at 88). The ALJ asked, "Would there remain unskilled jobs, which have been administratively noticed, which the Claimant could perform within the limitations of the hypothetical? The vocational expert answered, "Yes, in my opinion."

The ALJ asked a second hypothetical question:

> [A]n individual of the same age, sex education, past relevant work and impairments as previously specified. And this would be an individual who would have the residual functional capacity as follows. This individual could not lift more than 20 to 25 pounds, routinely lift five to 10 pounds, with no standing of more than 20 to 30 minutes at a time, no sitting of more that - - excuse me, no standing of more than 15 to 30 minutes at a time, and no walking of more than two blocks at a time. No repetitive - - or no more than occasional bending, stooping, twisting of neck, squatting, kneeling, or climbing. No repetitive pushing or pulling. No repetitive work with the arms overhead. No repetitive string gripping or gross, or fine manipulation or repetitive handling. And by handling, I mean using the writs to twist or turn objection. She is able to do only simple, routine, repetitive work, which does not rely on written material, and does not require constant close attention to detail or use of independent judgment or decision making. She does require occasional supervision. She cannot work at more tha[n] a regular pace and should not work at more than a mild level of stress. I assume this individual could not return to past relevant work, transfer acquired work skills, or perform the full and/or wide range of unskilled work activity. Would that be correct?

(R. at 89-90). When asked if there were unskilled jobs that Dunkerson could perform the vocational expert answered that there were none. (R. at 90). During the hearing the ALJ asked Dunkerson's attorney if there were any follow up questions. Dunkerson's attorney

asked the vocational expert questions regarding Dunkerson's ability to sit or stand. Dunkerson's attorney did not question the vocational expert further regarding the RFC used by the ALJ or the limitations regarding Dunkerson's depression/anxiety as outlined by the ALJ.

Judge Zoss concluded in his Report and Recommendation that the ALJ's hypothetical to the vocational expert reasonably incorporated Dunkerson's disabilities and limitations. Report and Recommendation, Doc. No. 16 at 49. The court concurs that the ALJ's hypothetical reflected Dunkerson's level of functioning and the jobs identified are within her abilities. The evidence is uncontroverted that Dunkerson's prior jobs required high or higher levels of functioning. It is also true that the hypothetical questions posed to the vocational expert accounted for Dunkerson's mental limitations by including the limitations of inability to do "very complex or technical work, but is able to do more than simple, routine, repetitive work, which does not require constant attention to detail or constant contact with the public; a position with occasional supervision and working at only a regular pace, avoiding more than mild to moderate levels of stress." (R. at 26).

The court is mindful that the ALJ has a duty to develop the record fully and fairly, even if the claimant is represented by counsel. *See Cox v. Apfel*, 160 F.3d 1203, 1208 (8th Cir.1998); *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir.1994). In this case, the ALJ properly developed the record regarding Dunkerson's depression/anxiety and included restrictions as to the pace and level of stress that Dunkerson can perform in an employment setting in combination with her physical limitations. The ALJ's hypothetical question tells the vocational expert that the medical evidence in this case establishes that Dunkerson's ability or lack of ability to do complex technical work is the consequence of her depression. Dunkerson has done complex or technical work but now with her depression her concentration, attention and pace are impacted. Although the ALJ did not specifically use the terms concentration and attention in his hypothetical this is harmless error. The ALJ did address Dunkerson's pace and her ability to work at only a mild to moderate stress

level. It is not, therefore, error for the ALJ to disregard the opinion of a psychologist that examined Dunkerson on one occasion and rely on the opinions of her treating physician, her treating psychiatric consultant, therapy and medical records provided by treating sources, and the opinions of other non-examining sources.

The court agrees that there is evidence supporting the ALJ's conclusion that, although severe, Dunkerson does not have an impairment or combination of impairments listed in or medically equal to one listed in the regulations. The hypothetical would have been improper only if the ALJ had not accounted for the limitations supported by the record. The ALJ's limitation to jobs as described above allows for Dunkerson's depression/anxiety and her physical limitations. Accordingly, substantial evidence supports the conclusion that the vocational expert identified jobs that were within Dunkerson's abilities when she listed the jobs Dunkerson could perform. The court also notes that, at the hearing, Dunkerson's attorney apparently disagreed with some of the ALJ's physical limitations as posed and cross-examined the vocational expert about Dunkerson's ability to sit and stand and how that would impact Dunkerson's RFC. Dunkerson's attorney failed to question the ALJ's limitations regarding Dunkerson's depression/anxiety limitations or question the vocational expert's assumption regarding Dunkerson's mental residual functional capacity. Nor was there a question asked on cross-examination that included Dunkerson's special education history. This leads the court to believe that Dunkerson's attorney did not, at the time of the hearing, disagree or believe the ALJ's hypothetical question was inadequate with regard to the limitations stated regarding Dunkerson's mental residual functional capacity. Regardless of this failure by Dunkerson's attorney, the court has reviewed the Dictionary of Occupational Titles regarding the two jobs identified by the vocational expert. The court agrees with Judge Zoss that the requirements of the jobs previously performed by Dunkerson demand a higher level of reasoning and communication skills than the two jobs the vocational expert cited as examples. The first job identified was

surveillance system monitor. The Dictionary of Occupational Titles describes this job as follows:

> Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action: Observes television screens that transmit in sequence views of transportation facility sites. Pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity. Adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions.

DICOT 379.367-010 (4th ed. 1991). The required level of aptitude for this job is a general learning ability of a medium degree, a verbal aptitude of a medium degree and a numerical aptitude of a low degree. The court agrees with the ALJ's findings that Dunkerson is capable of performing such activities and that her limitations do not prevent her from performing this type of job. The second job identified was office helper. The Dictionary of Occupational Titles describes this job as follows:

> Performs any combination of following duties in business office or commercial or industrial establishment: Furnishes workers with clerical supplies. Opens, sorts, and distributes incoming mail, and collects, seals, and stamps outgoing mail. Delivers oral or written messages. Collects and distributes paperwork, such as records or timecards, from one department to another. Marks, tabulates, and files articles and records. May use office equipment, such as envelope, sealing machine, letter opener, record shaver, stamping machine, and transcribing machine.

DICOT 239.567-010 (4th ed. 1991). The required level of aptitude for this job is a general learning ability of a medium degree, a verbal aptitude of a low degree and a numerical aptitude of a low degree. Again, the court agrees with the ALJ's findings that Dunkerson is capable of performing this type of job. The ALJ's hypothetical question accurately takes into consideration Dunkerson's abilities (both physical and mental) and the vocational

expert's testimony can constitute substantial evidence to support the ALJ's decision. Therefore, Dunkerson's objection as to this issue is overruled.

IV. CONCLUSION

Upon *de novo* determination of those portions of the Report and Recommendation, or specified proposed findings or recommendations to which Dunkerson has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that Dunkerson's objections must be **overruled**. Therefore, the Report and Recommendation by Magistrate Judge Paul A. Zoss concerning disposition of this matter is **accepted**. *see* 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].") — and **judgment shall enter in favor of the Commissioner** and against Dunkerson in this action.

IT IS SO ORDERED.

DATED this 24th day of March, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA